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No. 96-792

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LYNNE KALINA,
Petitioner,

v.

RODNEY FLETCHER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Is a prosecutor who has brought formal criminal charges against a defendant entitled to absolute immunity from an action under 42 U.S.C. § 1983 based entirely on the prosecutor's conduct in causing an arrest warrant to issue, pursuant to state statute and court rule, for the purpose of bringing the defendant before the court to respond to the charges?

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CITATIONS OF OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 93 F.3d 653 (9th Cir. 1996). (J.A. 22-28). The district court's Minute Order denying summary judgment is unreported. (J.A. 21).

GROUNDS FOR JURISDICTION

The decision of the Court of Appeals for the Ninth Circuit was filed on August 22, 1996. The Petition for Certiorari was filed on November 18, 1996 and was granted on February 24, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

STATUTORY AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. 42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or

Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

2. Wash. Rev. Code § 9A.72.085

(Reproduced verbatim in the Appendix at 5a-6a.)

3. Wash. Rev. Code § 10.37.010

No pleading other than an . . . information shall be required on the part of the state in any criminal proceeding . . . .

(Reproduced verbatim in the Appendix at 4a.)

4. Wash. Rev. Code § 36.27.020

The prosecuting attorney shall:

. . .

(4) Prosecute all criminal . . . actions in which the state . . . may be a party . . . .

. . .

(6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies . . . .

(Reproduced verbatim in the Appendix at 1a-3a.)

5. Wash. Rev. Code § 36.27.040 (Reproduced verbatim in the Appendix at 7a.)

6. 1909 Wash Laws, Ch. 87 (Reproduced verbatim in the Appendix at 8a.)

7. Washington Constitution Art. I, § 25

Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law.

Adopted 1889.

COURT RULES INVOLVED

1. Washington Criminal Rule 2.1

(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(b) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . .

(Reproduced verbatim in the Appendix at 9a-10a.)

2. Washington Criminal Rule 2.2

(a) Warrant of Arrest. If an . . . information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant. Before ruling on the request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest must be supported by an affidavit or affidavits or sworn testimony establishing the grounds for issuing the warrant. . . . The court must determine that there is probable cause before issuing the warrant. The finding of probable cause may be based on evidence which is hearsay in whole or in part, subject to constitutional limitations.

(Reproduced verbatim in the Appendix at 11a-13a.)

3. King County, Washington Local Criminal Rule 2.2

(g) Information to Be Supplied to the Court. When a charge is filed in Superior Court and a warrant is requested, the Court shall be provided with the following information about the person charged:

. . .

(2) By the prosecuting attorney, insofar as possible.

(A) A brief summary of the alleged facts of the charges;

. . .

(D) Any other facts deemed material to the issue of pretrial release.

(Reproduced verbatim in the Appendix at 14a.)

4. Washington Criminal Rule 3.4

RULE 3.4 PRESENCE OF THE DEFENDANT

(a) When Necessary. The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules or as excused or excluded by the court for good cause shown.

(b) ....

(Reproduced verbatim in the Appendix at 15a.)

STATEMENT OF THE CASE

This is a damages action brought pursuant to 42 U.S.C. § 1983. Mr. Rodney Fletcher's (respondent's) complaint alleged that King County, Washington, deputy prosecutor Lynne Kalina (petitioner) violated his civil rights when she sought an arrest warrant in initiating a prosecution against him, in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. Mr. Fletcher contended that the deputy prosecutor sought the arrest warrant based on facts she knew, or should have known, to be false.[1] The background to Mr. Fletcher's claim follows.

[1] The portions of the Statement of the Case suggesting that deputy prosecutor Kalina filed charges and sought an arrest warrant based on false information are taken from respondent's complaint and are accepted as true only for purposes of her motion to dismiss based on absolute immunity. Ms. Kalina has denied the allegations of wrongdoing. (J.A. 8-10).

On November 30, 1992, the Seattle Police Department referred a completed investigation report on a burglary case to the Office of the King County Prosecuting Attorney. The report alleged that Mr. Fletcher had illegally entered Our Lady of Guadalupe School where he stole money, a computer, two printers and a modem. (J.A. 19). In the course of her routine duties in the Prosecuting Attorney's Filing Unit (J.A. 11), deputy prosecutor Kalina reviewed the report referred by the Seattle Police Department and determined that criminal charges should be filed against Mr. Fletcher. (J.A. 11). Ms. Kalina prepared three pleadings to initiate the prosecution: (1) an Information, charging Mr. Fletcher with burglary in the second degree; (2) a Certification for Determination of Probable Cause ["Certification"]; and (3) a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of Warrant and Fixing Bail ["Motion"].

The Certification, which lies at the heart of Mr. Fletcher's complaint, is a sworn statement summarizing the evidence generated as a result of the police investigation.[2] In the Certification, Ms. Kalina recited, in part, that Mr. Fletcher's fingerprints had been lifted from the crime scene and that he had never been associated with the school. The Certification further recited that an eyewitness had identified Mr. Fletcher from a photo montage as one of the persons who attempted to sell the property stolen from the school. (J.A. 12-20).

Ms. Kalina filed these charging documents with the King County Superior Court on December 14, 1992.

[2] Washington Criminal Rule 2.2(a) requires that an arrest warrant be supported by "sworn testimony establishing the grounds for issuing the warrant." The rule further provides that the court may determine probable cause "based on evidence which is hearsay in whole or in part, subject to constitutional limitations." Under Washington state law, Ms. Kalina's Certification satisfies this requirement. *See* Wash. Rev. Code § 9A.72.085 (1996) (providing, *inter alia*, a certification made under penalty of perjury is the equivalent of an affidavit). *Accord* King County Local Criminal Rule 2.2.

Later that same day, the trial court found probable cause, granted the Motion and ordered that an arrest warrant be issued for Mr. Fletcher. The trial court's order provided that, after booking, he was to be released on his personal recognizance if he promised to appear for arraignment. (J.A. 12, 14-16).

On September 24, 1993, Mr. Fletcher was arrested.[3] (J.A. 6). A few weeks later, Mr. Fletcher's attorney informed the King County Prosecuting Attorney's Office that Mr. Fletcher had previously performed some construction work for Our Lady of Guadalupe School, which could have accounted for his fingerprint being present at the crime scene. In addition, further review by the prosecutor's office revealed that Mr. Fletcher had not been identified by an eyewitness as one of the persons who tried to sell property stolen from the school. In light of these circumstances, on October 26, 1993, the trial court dismissed the charges against Mr. Fletcher upon motion of the prosecuting attorney. (J.A. 5-6).

Procedurally, the manner in which Ms. Kalina initiated the prosecution against Mr. Fletcher is the same as the thousands of other prosecutions initiated each year by the King County Prosecuting Attorney.[4] In Washington state, a prosecuting attorney may initiate felony criminal charges by Information. Wash. Crim. R. 2.1 (App. at 9a); Wash. Rev. Code § 10.37.010 (1996) (App. at 4a).[5]

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[3] Mr. Fletcher spent one day in the King County Jail following his arrest. Although this fact is not contained in the record before this Court, the fact is undisputed.

[4] In 1992, the year charges were filed against Mr. Fletcher, the King County Prosecuting Attorney filed 7,548 felony cases. *Washington State County Criminal Justice Databook 1985-1995* at 86 (Feb. 1996).

[5] As a technical matter, a criminal prosecution may be initiated by indictment. However, the State of Washington abandoned its mandatory grand jury practice some 80 years ago and prosecutions are now initiated by Information. *See* Wash. Const. art. I, § 25; 1909 Wash. Laws, ch. 87; Note, *Felony Information: Due Process and Preliminary Hearing on Probable Cause*, 42 Wash. L. Rev. 903 (1967). This Court approved this procedure in *Beck v. Washington*, 369 U.S. 541, 545 (1962).

A prosecution initiated by Information in Washington state consists of the filing of three pleadings to commence and continue the prosecution. These three pleadings constitute the charging package and are filed simultaneously after the prosecutor has determined that charges are to be filed. (J.A. 12).

The first pleading is the Information, which is a "plain, concise and definite written statement of the essential facts constituting the offense charged" that must be signed by the prosecuting attorney. Wash. Crim. R. 2.1(b) (App. 9a).[6] As a practical matter, the Information in larger counties is generally signed by a deputy prosecutor pursuant to Wash. Rev. Code § 36.27.040, which provides that deputy prosecutors "shall have the same power in all respects as their principal." (App. 7a).

The second pleading is the Certification for Determination of Probable Cause, which is a sworn statement signed by the prosecuting attorney setting forth the essential facts constituting probable cause for charging the defendant. The deputy prosecutor obtains these facts from the completed police investigative reports and summarizes them in the Certification. (J.A. 19-20). This sworn document is attached to the Information and serves as the basis for a judicial determination of probable cause, which is necessary to justify pretrial detention. *See Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (holding that the United States Constitution requires a judicial determination of

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[6] Washington Criminal Rules 2.1 and 2.2 have been amended since the events occurred which gave rise to Mr. Fletcher's case. While relevant sections of the 1994 annual edition of the court rules have been included in the Appendix, the operative provisions of rules 2.1 and 2.2 are identical to those in effect in 1992, the year in which the underlying prosecution was initiated. Although these rules have been amended since 1994, no provision relevant to the proceedings involving Mr. Fletcher has been substantively changed.

probable cause, which can be based on testimony or affidavit, before a suspect can be kept in custody).

The third part of the charging package is a Motion requesting that the court take three interrelated actions: (1) make a finding of probable cause; (2) issue an arrest warrant; and (3) fix bail or release the accused on personal recognizance. The arrest warrant is sought by the prosecutor and issued by the court in order to provide the trial court with personal jurisdiction over the accused.[7] This charging procedure has been developed to comply with Washington law, which imposes a duty on the prosecutor to "institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies. . . ." Wash. Rev. Code § 36.27.020(6) (1996)[8] (App.1a).

This case arose when deputy prosecutor Kalina followed this Washington law, filed burglary charges and sought a warrant for Mr. Fletcher's arrest. It is undisputed that the arrest occurred after criminal charges had been filed and that the application for the arrest warrant was a part of the charging documents submitted to the court.

PROCEEDINGS BELOW

The district court denied deputy prosecutor Kalina's motion for summary judgment by a Minute Order concluding that she was not entitled to absolute prosecutorial immunity. (J.A. 21).

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[7] The Motion for issuance of the arrest warrant shows, on its face, that the arrest is for the purpose of ensuring that the defendant will be available for trial and, if found guilty, for punishment. The Motion provides that the defendant will either be held on bond or released on personal recognizance after promising to appear for arraignment at the scheduled date and time. (J.A. 14-16).

[8] The 1987 version of this statute was in effect at all times relevant to this case. This statute was amended once subsequently, in 1995, in a manner that does not affect these proceedings. *Compare* 1987 Wash. Laws, ch. 202, § 205 *with* 1995 Wash. Laws, ch. 194, § 4.

Deputy prosecutor Kalina took an interlocutory appeal to the United States Court of Appeals for the Ninth Circuit.[9] The court of appeals affirmed the district court and held that a "prosecutor is not absolutely immune when preparing a declaration in support of an arrest warrant." *Fletcher v. Kalina*, 93 F.3d 653, 655 (9th Cir. 1996) (J.A. 26-27). The court of appeals found that the deputy prosecutor's actions in signing and filing the declaration for an arrest warrant were virtually identical to the police officer's actions in *Malley v. Briggs*, 475 U.S. 335 (1986), and held that she should, therefore, receive only the qualified immunity granted to the police officer in *Malley*. *Id.* at 656 & n.2 (J.A. 27).

SUMMARY OF ARGUMENT

I. In *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), this Court recognized that prosecutors are absolutely immune from suit under 42 U.S.C. § 1983 to the same extent that they were immune from suit under the common law. As *Imbler* explains, the common law traditionally immunized prosecutors from suit for causing an arrest warrant to issue in connection with the initiation of a prosecution. It follows from *Imbler* that a prosecutor seeking an arrest warrant in connection with filing charges is absolutely immune from liability under § 1983. With the exception of the court of appeals in this case, every court that has considered the issue has read *Imbler* in this fashion.

II. This Court's post-*Imbler* decisions are also consistent with a recognition of absolute immunity for a prosecutor who seeks an arrest warrant as an integral part of the initiation of a prosecution. In deciding whether a particular act of the prosecutor is entitled to absolute immunity, the focus of the inquiry is whether the action

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[9] An order denying a claim of absolute immunity is immediately appealable under the collateral order doctrine. *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982).

was taken in the prosecutor's role as an advocate. Here, Ms. Kalina's decision to seek an arrest warrant, and her preparation of the Certification to effectuate that decision, were integral to her role as the state's advocate in the prosecution of Mr. Fletcher. Ms. Kalina's actions bore no functional resemblance to the police officer's conduct in *Malley v. Briggs*, 475 U.S. 335 (1986), where the request for an arrest warrant was not incidental to the quasi-judicial act of initiating a prosecution. Rather, the conduct here was more closely analogous to the prosecutor's conduct in *Burns v. Reed*, 500 U.S. 478 (1991), where this Court found that absolute immunity attached to a prosecutor's actions at a probable cause hearing in support of an application for a search warrant.

III. Compelling policy arguments support recognizing absolute immunity here. Like judges, prosecutors occupy positions in the criminal justice system that make them particularly susceptible to retaliatory lawsuits. The inhibition posed by the specter of entanglement in civil litigation could lead prosecutors to make judgment calls influenced by the risk of potential litigation rather than an assessment of the merits. For example, prosecutors might be reluctant to initiate prosecution of close cases, knowing that they may be exposed to civil litigation if they decide to seek an arrest warrant to ensure that the accused is present for trial. As *Imbler* recognized, the integrity of the judicial process demands a recognition of absolute immunity for the full spectrum of prosecutorial decisions that accompany initiation of a prosecution. Anything less will result in the expenditure of substantial prosecutorial time and energy in defense of civil actions, rather than the fearless pursuit of justice.

ARGUMENT

I. A PROSECUTOR WHO INITIATES A CRIMINAL PROSECUTION IS ENTITLED TO ABSOLUTE IMMUNITY UNDER *IMBLER* WHEN SHE APPLIES FOR AN ARREST WARRANT TO ENSURE THAT THE ACCUSED IS AVAILABLE FOR TRIAL AND, IF FOUND GUILTY, FOR PUNISHMENT.

This Court has long recognized that it is a "principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). Relying on *Bradley*, the Court two decades ago recognized that prosecutors are absolutely immune from 42 U.S.C. § 1983 liability for acts "intimately associated with the judicial phase of the criminal process," including conduct in "initiating a prosecution and presenting the State's case." *Imbler v. Pachtman*, 424 U.S. 409, 430, 431 (1976). In so doing, the Court noted the pivotal role the prosecutor plays in the judicial phase of the criminal process:

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby.

Id. at 423 (quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. 1935)). *Imbler* did not limit a prosecutor's absolute immunity to actions taken in the courtroom. Rather, the Court noted that "the duties of the prosecutor in his role as advocate for the state involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," which are likewise entitled to immunity. *Id.* at 431 n.33. *See also Buckley v. Fitzsim-*

mons, 509 U.S. 259, 270 (1993); *Burns v. Reed*, 500 U.S. 478, 486 (1991).

Imbler's recognition of absolute prosecutorial immunity from actions under § 1983 did not spring from the void. Rather, the Court expressly rested its decision "upon a considered inquiry into the immunity historically accorded [prosecutors] at common law and the interests behind it." *Imbler*, 424 U.S. at 421. After reviewing the common law rule of absolute immunity for prosecutors engaged in quasi-judicial functions, the Court concluded that the rule of absolute immunity for prosecutors' acts associated with the judicial phase of the criminal process was "well settled." *Id.* at 424. The Court's decision in *Imbler*, then, can be understood only by considering the common law precedent upon which it relies.

As with this case, *Imbler*'s antecedents involved allegations of prosecutorial wrongdoing in procuring an arrest. In *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896), for example, the plaintiff alleged that the local prosecutor, "*willfully, maliciously, and without probable cause . . . caused a warrant to be issued for the arrest of said plaintiff on said indictment and caused said plaintiff to be arrested thereon . . . .*" *Id.* at 1001 (emphasis added). As this Court noted in *Imbler*, the Indiana Supreme Court dismissed the action on the ground that the prosecutor was absolutely immune, despite allegations of malice. *Imbler*, 424 U.S. at 421.[10] Similarly, in *Yaselli v. Goff*, 12 F.2d

[10] The court in *Griffith* relied on the following passage from John Townshend, Slander and Libel, § 227, at 395-96 (3d ed. 1877), in granting absolute immunity to the prosecutor who caused the arrest:

> Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.

44 N.E. at 1002.

396 (2d Cir. 1926), *aff'd*, 275 U.S. 502 (1927) (per curiam), the complaint alleged that *the prosecutor caused the plaintiff to be arrested by the use of false and misleading evidence.* Noting that *Yaselli* had engaged in an extensive review of the common law tradition of granting immunity,[11] this Court focused on the following passage from the Second Circuit's opinion:

> In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case.

Yaselli, 12 F.2d at 406, quoted in *Imbler*, 424 U.S. at 422.[12]

[11] The court in *Yaselli* cited with approval *Watts v. Gerking*, 222 P. 318, 228 P. 135 (Ore. 1924) where, on rehearing, the Oregon court granted absolute immunity to a district attorney who was alleged to have maliciously caused an arrest for an offense he knew had not been committed at all. *Yaselli*, 12 F.2d at 404-05.

[12] As *Imbler* points out, this Court affirmed *Yaselli* in a per curiam opinion, *Yaselli v. Goff*, 275 U.S. 503 (1927) (per curiam), on the authority of *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871), and *Alzua v. Johnson*, 231 U.S. 106 (1913). *Yaselli*, 275 U.S. at 503.

Griffith and *Yaselli* show that, at common law, a prosecutor was absolutely immune even if the prosecutor willfully and maliciously initiated a prosecution without probable cause, based on false and misleading evidence. Both cases recognize that prosecutors often cause an arrest warrant to issue as an integral part of initiating a prosecution. Thus, because *Imbler* expressly extended the common law's absolute immunity to cases arising under § 1983, it follows that a prosecutor seeking an arrest warrant in connection with filing charges is absolutely immune under § 1983, just as the common law provided.

A majority of the federal appellate courts considering the question have so read *Imbler*.[13] The Tenth Circuit has most recently articulated the basis for this proper application of *Imbler* in *Roberts v. Kling*, 104 F.3d 316 (10th Cir. 1997), as follows:

> Finally, the act of obtaining an arrest warrant in conjunction with the filing of a criminal complaint is functionally part of the initiation of a criminal proceeding, and therefore prosecutorial in nature. As this court stated in *Lerwill v. Joslin*.
>
> > [W]e think that a prosecutor's seeking an arrest warrant is too integral a part of his decision to file charges to fall outside the scope of *Imbler*. The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a prosecution would be futile. Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his "initiation of a prosecution" under *Imbler*.

Roberts, 104 F.3d at 320 (citing *Lerwill v. Joslin*, 712 F.2d 435, 437-38 (10th Cir. 1983) (seeking an arrest warrant is part of initiating a prosecution). Other circuits

[13] *See* discussion *infra* n.14 and accompanying text.

have reached the same correct conclusion based on similar readings of *Imbler*.[14] *See Pena v. Mattox*, 84 F.3d 894, 896 (7th Cir. 1996) (noting that the defendant prosecutor properly claimed absolute immunity with regard to both drafting and authorizing the original criminal complaint and procuring the arrest warrant); *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995) (seeking an arrest warrant in connection with filing charges entitled the prosecutor to absolute immunity); *Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990) (prosecutor who performs functions within the continuum of initiating and presenting a criminal case, such as seeking an arrest warrant, is ordinarily entitled to absolute immunity), *cert. denied*, 499 U.S. 976 (1991); *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986) (seeking an arrest warrant is part of initiating a prosecution), *cert. denied*, 481 U.S. 1023 (1987).[15]

These courts have appropriately applied *Imbler*. Applying *Imbler* to grant absolute immunity in cases such as this preserves the integrity of the criminal phase of the judicial process and allows prosecutors effectively to discharge their duties in initiating prosecutions, without looking over their shoulders out of concern for civil liability. By contrast, subjecting prosecutors to suit for engaging in the common practice of securing an arrest warrant as part of the initiation of a prosecution would "prevent the vigorous and fearless performance of the prosecutor's duty that is

[14] Further, the Third and Fourth Circuits have analogized seizure warrants obtained in civil forfeiture proceedings to arrest warrants and have granted absolute immunity to prosecutors who make requests for seizure warrants. *See Schrob v. Catterson*, 948 F.2d 1402 (3rd Cir. 1991); *Ehrlich v. Giuliani*, 910 F.2d 1220 (4th Cir. 1990).

[15] In reaching a contrary conclusion, the court below purported to follow the Eighth Circuit's decision in *Kohl v. Casson*, 5 F.3d 1141 (8th Cir. 1993). In fact, the prosecutor's alleged misconduct in *Kohl* occurred during the investigative pre-indictment phase of the judicial process, not as part of the initiation and presentation of a criminal prosecution. As explained below, that fact has dispositive significance.

essential to the proper functioning of the criminal justice system." *Imbler*, 424 U.S. at 427-28.[16]

II. THIS COURT'S POST-*IMBLER* DECISIONS ARE CONSISTENT WITH THE PRINCIPLE THAT A PROSECUTOR INITIATING A CRIMINAL PROSECUTION IS ENTITLED TO ABSOLUTE IMMUNITY UNDER *IMBLER* WHEN SHE APPLIES FOR AN ARREST WARRANT, BECAUSE THAT CONDUCT OCCURS IN HER ROLE AS AN ADVOCATE FOR THE STATE.

In the twenty years since *Imbler*, this Court has held that actions of a prosecutor falling within the advocate's role are fully immunized. In other words, the Court has consistently held that a prosecutor is absolutely immune where the prosecutor acts as an advocate for the state in conjunction with the initiation of criminal proceedings. Four years ago, this Court stressed that this principle remained unchanged:

> We have not retreated, however, from the principle that *acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity*. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

Buckley, 509 U.S. 259, 273 (1993) (emphasis added).[17]

[16] Furthermore, applying *Imbler* so as to deny absolute immunity for this function would render its protection for a prosecutor almost meaningless. Where the arrest warrant issues as a direct consequence of immunized conduct, it would turn *Imbler* into little more than a pleading rule to allow a civil case to proceed simply because the claim against the prosecutor is one based upon the arrest and not the filing of criminal charges which led to that arrest.

[17] In *Buckley*, the prosecutor was denied absolute immunity for his conduct in staging a press conference and leading an investigation into a highly publicized murder. The investigation was conducted under the joint supervision and direction of the sheriff and prosecutor, whose police officers and assistant prosecutors performed essentially the same investigatory functions. Evidence was fabricated during the investigation, well before a special grand jury was empaneled. The principles underlying *Imbler* led this Court to conclude that "[w]hen the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same." *Buckley*, 509 U.S. at 276. Therefore, the prosecutor was entitled to claim only qualified immunity, as were the police officers. *Id.* This case, however, does not concern Ms. Kalina's investigative conduct nor does it concern conduct similar in function to that of a police officer. *See* discussion *infra* Part II(A)-(C).

This approach to prosecutorial immunity conforms to the general principle that immunities attach to functions, not to people, a point this Court has made repeatedly since *Imbler*. Here, Ms. Kalina filed the Certification in her capacity as an advocate for the State of Washington in conjunction with the initiation of a prosecution. Regardless of the form the Certification took, it was an integral part of the prosecutorial and judicial function, and thus immunized under *Imbler*. Further, a finding of immunity in this case comports with this Court's post-*Imbler* decisions.

A. In Requesting an Arrest Warrant in Conjunction With the Filing of an Information, a Prosecutor Acts as an Advocate for the State and Performs a Traditional Prosecutorial Function.

The functional analysis developed in *Imbler* and employed in *Buckley* recognizes that a number of prosecutorial acts necessarily accompany proper preparation for the judicial phase of the criminal process. *Buckley*, 509 U.S. at 273. Once a prosecutor decides to initiate criminal charges, the prosecutor must ensure that the trial court acquires personal jurisdiction over the accused. Trial *in absentia* is an anathema to fundamental principles of criminal justice, and due process requires that a defendant be present in court for the state to prosecute. *See, e.g., Crosby v. United States*, 506 U.S. 255 (1993), ("It

is well settled that . . . at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony. . . . If he is absent . . . a conviction will be set aside.") (quoting W. Mikell, *Clark's Criminal Procedure* 492 (2d ed. 1918)); *Snyder v. Massachusetts*, 291 U.S. 97 (1934).[18] The issuance of an arrest warrant provides this assurance.

As a result, arrest warrants ordinarily follow as a matter of course from a grand jury indictment. An indictment that is fair upon its face and returned by a properly constituted grand jury conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States*, 287 U.S. 241, 250 (1932). A refusal to issue a warrant under such circumstances is "in reality and effect, a refusal to permit the case to come to a hearing upon either questions of law or of fact, and falls little short of a refusal to permit the enforcement of the law." *Id.*

An Information is the functional equivalent of a grand jury indictment. Both charging mechanisms confer subject matter jurisdiction on the trial court. 41 Am. Jur. 2d *Indictment and Information* § 19 (1995). The only distinguishing feature between the two is that an Information is a written accusation of crime filed by a public prosecuting officer without the intervention of a grand jury. *Id.* § 3. Under the information system, the arrest warrant flows from the issuance of the Information and demonstration of probable cause, much like the arrest warrant under the indictment system results from presentation of evidence to a grand jury.

Thus, in seeking an arrest warrant following an indictment or an Information, a prosecutor performs a function intimately related to the prosecutor's role as an advocate for the state. Having used the charging mechanism to give the court subject matter jurisdiction, the prosecutor obtains the arrest warrant in aid of the court's exercise of

[18] *See also* Wash. Crim. R. 3.4; *State v. Jackson*, 878 P.2d 453 (Wash. 1994); *State v. Hammond*, 854 P.2d 637 (Wash. 1993).

personal jurisdiction over the accused.[19] The prosecutor's acts in performing that function are among those that *Buckley* expressly recognized as immunized: "the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation" to the court after the decision to file an Information has been made. *Buckley*, 509 U.S. at 273.

Any impediment to the prosecutor's ability to obtain an arrest warrant following an indictment or other initiation of a prosecution would necessarily impair the functioning of the judicial phase of the criminal process.[20] To impose the specter of entanglement in civil litigation on a prosecutor any time that prosecutor applies for an arrest warrant (whether through a Certification or some other mechanism) as a part of the initiation of a prosecution would raise precisely such an impediment.

B. A Prosecutor Who Initiates Criminal Charges and Seeks an Arrest Warrant Does Not Perform the Same Function as a Police Officer Who Seeks an Arrest Warrant Prior to a Case Being Submitted to the Prosecutor for a Charging Decision.

Deputy prosecutor Kalina's conduct can be distinguished from that of the police officer in *Malley* by comparing the nature of the function each actor performed. The court below found "little, if any, distinction" between the deputy prosecutor's conduct in the case at bar and the police officer's conduct in *Malley*, 475 U.S. at 335. *Fletcher*, 93 F.3d at 656 n.2. Viewing petitioner's conduct in this light, the court of appeals then misapplied the same act/

[19] *See supra* n.18 and *infra* n.26.

[20] In opposing *certiorari*, Mr. Fletcher suggested that Ms. Kalina could have acquired personal jurisdiction over him by issuing a summons, rather than by procuring an arrest warrant. *See* Respondent's Brief in Opposition, at 10 n.5. That argument, however, challenges only the procedure used by the prosecutor to acquire personal jurisdiction. It has no bearing on the *function* of the Certification, given that it was issued *after* the decision had been made to file an Information and in the course of the deputy prosecutor's role as an advocate. *See infra* n.26.

same immunity analysis contained in this Court's opinion in *Buckley*, 509 U.S. at 273. *See Fletcher*, 93 F.3d at 656. But when one compares the functions of the acts at issue, as *Imbler* and its progeny require, deputy prosecutor Kalina's conduct is manifestly distinct from the police officer's conduct in *Malley*.

The relevant inquiry under the functional analysis is on the nature and function of a particular act, not on the act itself. *Mireles v. Waco*, 502 U.S. 9, 13 (1991) (citing *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)). Under this approach, the function and not the act should control. Indeed, Justice Kennedy has noted that "[t]wo actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions" and that it would not be incongruous for one to receive immunity and the other not. *Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part) (arguing for broader immunity for a prosecutor than for a police officer). The flaw in the Ninth Circuit's analysis is that it did not consider the difference in the nature and function of the acts it sought to compare, instead focusing on the act alone.

In the present case, deputy prosecutor Kalina sought an arrest warrant to aid the trial court's exercise of personal jurisdiction over a charged defendant. The police officer in *Malley*, on the other hand, sought an arrest warrant prior to any decision by a prosecutor to seek an indictment or otherwise initiate a criminal prosecution.[21] In arguing for absolute immunity, the police officer in *Malley* asserted that (1) his function in seeking an arrest warrant was similar to that of a complaining witness; or (2) his conduct was similar to that of a prosecutor seeking an

[21] In *Malley*, the police officer was operating in Rhode Island, a state which uses a grand jury to initiate criminal prosecutions. The police officer filed a criminal complaint during the course of his investigation and also sought and obtained an arrest warrant against Briggs. After a grand jury declined to return an indictment, Briggs sued under § 1983. *Malley*, 475 U.S. at 342-43.

indictment. *Malley*, 475 U.S. at 340-41. This Court rejected the police officer's first contention because complaining witnesses were not absolutely immune at common law, but were accorded only a qualified immunity. *Id.* at 340-41 & n.3.[22] As to the officer's second contention, the Court distinguished a police officer, who files a criminal complaint and warrant request, from a prosecuting attorney, who actually makes the charging decision and seeks the indictment. This Court noted that the police officer's act was further removed from the judicial process and therefore not entitled to absolute immunity:

> We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, *is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment*. Furthermore, petitioner's analogy, while it has some force, does not take account of the fact that the prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction. Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor

[22] In support, *Malley* cited *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); *Randall v. Henry*, 5 Stew. & P. 367, 378 (Ala. 1834); *Bell v. Keepers*, 14 P. 542 (Kan. 1887); and *Finn v. Frink*, 24 A. 851 (Me. 1892). *Bell v. Keepers* and *Finn v. Frink* are illustrative of that status. In both cases, the "complaining witnesses" were private citizens, not prosecutors, who, believing themselves aggrieved by the conduct of another, filed criminal complaints directly with the trial court, which led to the issuance of warrants. Modernly, the common law status of "complaining witness" has been addressed in the context of a non-prosecutor and has been defined by a number of lower courts as one who causes a baseless criminal prosecuton. *See, e.g., Enlow v. Tishomingo County, Miss.*, 962 F.2d 501, 511 n.29 (5th Cir. 1992); *Anthony v. Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992); *White v. Frank*, 855 F.2d 956, 958-59 (2d Cir. 1988).

> seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.

Id. at 342-43 (emphasis added).

The critical distinction between this case and *Malley* is, therefore, the function each actor performs in the criminal justice system. This Court has noted that "[t]he common law has never granted police officers an absolute and unqualified immunity. . . ." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). This Court has recognized that there is an inherent difference between the functions a police officer and a prosecutor perform within the criminal justice system. A prosecutor initiates criminal charges; a police officer does not.

Complaining witnesses such as the police officer in *Malley* were accorded only qualified immunity at common law. *See Malley*, 475 U.S. at 340-41 & n.3. Prosecutors were accorded absolute immunity at common law for initiating a prosecution and presenting the state's case. *Imbler*, 424 U.S. at 423-24. The conclusion to be derived from these two rules is that a public prosecutor who initiates criminal charges and takes steps in furtherance of that prosecution cannot be considered a complaining witness as that term is used in the common law.[23] Any other conclusion would be at odds with

[23] The Court has suggested that the status of complaining witness does not apply to a public prosecutor. In *Wyatt v. Cole*, 504 U.S. 158, 164-65 (1992), it was stated:

> Respondents do not contend that private parties who instituted attachment proceedings and who were subsequently sued for malicious prosecution or abuse of process were entitled to absolute immunity. And with good reason; although public prosecutors and judges were accorded absolute immunity at common law, *Imbler v. Pachtman, supra*, at 421-424, such protection did not extend to complaining witnesses who, like respondents, set the wheels of government in motion by instigating a legal action. *Malley v. Briggs*, 475 U.S. 335, 340-341 (1986) ("In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause.").

Imbler. Of course, as *Imbler*, *Malley* and *Buckley* show, when a prosecutor acts outside her role as the state's advocate in initiating a prosecution and presenting the state's case she would receive only such protection as was accorded that function at common law. In this case, the prosecutor did not do so.

Deputy prosecutor Kalina sought the arrest warrant in this case as the means to bring the charged defendant before the court. Seeking the arrest warrant was an integral part of her initiation of the prosecution and was intimately associated with the judicial phase of the criminal process. Contrary to the decision below this case presents a situation vastly different from the situation in *Malley*.

C. Deputy Prosecutor Kalina Is Entitled to Absolute Immunity Under *Burns* Because Her Presentation of a Certification in Support of an Application for an Arrest Warrant to a Judge Was Done in Her Role as Advocate for the State.

In *Burns v. Reed*, this Court granted absolute immunity to a prosecutor who appeared at a probable cause hearing in support of an application for a search warrant. *Burns*, 500 U.S. at 492. This Court reasoned as follows:

> The prosecutor's actions at issue here—appearing before a judge and presenting evidence in support of a motion for a search warrant—clearly involve the prosecutor's "role as advocate for the State," rather than his role as "administrator or investigative officer," the protection for which we reserved judgment in *Imbler*, see *id.*, at 430-431, and n.33. Moreover, since the issuance of a search warrant is unquestionably a judicial act, see *Stump v. Sparkman*, 435 U.S. 349, 363, n.12 (1978), appearing at a probable-cause hearing is "intimately associated with the judicial

> phase of the criminal process." *Imbler, supra,* at 430. It is also connected with the initiation and conduct of a prosecution, particularly where the hearing occurs after arrest, as was the case here.

Id. at 491-92.

The issuance of the arrest warrant in this case was a judicial act. While she did not personally appear in Court when the warrant was issued, deputy prosecutor Kalina's filing of the Certification was an act of presenting evidence to the court in support of issuance of the warrant. There is no significant difference in function between a prosecutor who presents evidence to the court by live testimony and a prosecutor who presents evidence to the court in the form of an affidavit, particularly where the prosecutor controls the flow of information to the court. In both instances the prosecutor is providing the court with the factual basis for a judicial determination of probable cause. As such, Ms. Kalina is entitled to absolute immunity. As this Court noted, such acts taken

> by the prosecutor in support of taking criminal action against a suspect present a substantial likelihood of vexatious litigation that might have an untoward effect on the independence of the prosecutor. Therefore, absolute immunity for this function serves the policy of protecting the judicial process, which underlies much of the Court's decision in *Imbler*.

Id. at 492.

The facts of the present case present the same potential for "vexatious litigation." Absolute immunity should be recognized for a prosecutor who applies directly to the court for an arrest warrant to continue the prosecution already initiated.

III. THE POLICY CONSIDERATIONS ENUNCIATED IN *IMBLER* SUPPORT THE PRINCIPLE THAT A PROSECUTOR WHO INITIATES A CRIMINAL PROSECUTION IS ENTITLED TO ABSOLUTE IMMUNITY UNDER *IMBLER* WHEN THAT PROSECUTOR APPLIES FOR AN ARREST WARRANT TO ENSURE THAT THE DEFENDANT IS AVAILABLE FOR TRIAL AND, IF FOUND GUILTY, FOR PUNISHMENT.

A. The Loss of Absolute Immunity Will Have a Chilling Effect on Prosecutors in the Administration of Justice.

Imbler recognized that fear of potential entanglement in civil litigation would undermine prosecutors' performance of their duties. Conscious of the possibility of a civil suit, a prosecutor might make decisions influenced by the risk of potential litigation.[24] Further, the fear of entanglement in civil litigation would divert energy and attention from the pressing duty of enforcing the criminal law:

> There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. . . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial

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[24] As this Court noted in *Imbler*, 424 U.S. at 427 n.24:

> A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages.
>
> On the other hand, a prosecutor should feel free to dismiss a case in the interests of justice (as the prosecutor did here) without fear that the decision will be the springboard for a later claim.

> policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement.

Imbler, 424 U.S. at 424-25. It is for this reason that absolute rather than qualified immunity was accorded to prosecutors for their acts undertaken in connection with the initiation of criminal charges:

> If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of a common law suit for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate.

Id.

Petitioner's conduct in this case is fully within the function of the initiation of a prosecution under *Imbler*. As such, absolute rather than qualified immunity must attach.

B. Qualified Immunity Is Insufficient to Preserve the Integrity of the Judicial Process When a Prosecutor Seeks an Arrest Warrant as an Integral Part of the Filing of Criminal Charges.

Included among the primary statutory functions of a prosecuting attorney in Washington state are the duties to "[p]rosecute all criminal . . . actions in which the state . . . may be a party . . ." and to "[i]nstitute and prosecute proceedings before magistrates for the arrest

of persons charged with or reasonably suspected of felonies." Wash. Rev. Code § 36.27.020(4), (6) (App. 1a). As this Court recognized in *Imbler*:

> It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

Imbler, 424 U.S. at 425. Stripping the cloak of absolute immunity from a function delegated by the legislature to the prosecutor, which is integral to the initiation of a prosecution, would directly conflict with the principles enunciated in *Imbler*.[25]

In any prosecution initiated in furtherance of a prosecutor's statutory duty, questions will arise that require the

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[25] In *Yaselli*, the Second Circuit Court of Appeals also described the paramount importance of granting absolute immunity under these circumstances:

> Whenever, therefore, the state confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the state says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in the faithful discharge of them he shall be called to account as a criminal, but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages.

Yaselli, 12 F.2d at 402 (quoting 2 Thomas M. Cooley, Law of Torts at 795 (3d ed. 1926)).

exercise of prosecutorial discretion. Resolution of these questions necessarily involves a critical evaluation of the evidence and consideration of the strategies best suited to a successful prosecution. One of those considerations is whether or not to seek an arrest warrant to compel the defendant to appear before the court.[26] Granting only qualified immunity to these prosecutorial decision-making functions would result in "a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury." *Id.* at 425. The burdens imposed on the prosecutor by this potential entanglement in civil litigation can only result in the impairment of the judicial phase of the criminal process by deflecting the prosecutor's attention away from his or her duty of enforcing the criminal law.

A prosecutor's decisions whether to seek an arrest warrant and, if so, how to present the supporting evidence for the warrant in a Certification can be easily questioned with the benefit of hindsight. A grant of qualified im-

[26] Respondent has suggested that a summons can issue in lieu of an arrest warrant to ensure the defendant's presence for trial. *See* Respondent's Brief in Opposition at 10 n.5. The actual presence of the defendant is essential to the operation of the judicial process because trial ordinarily cannot proceed without the defendant. *Crosby v. United States*, 506 U.S. 255. One of the discretionary decisions a prosecutor must make is whether to seek an arrest warrant or to rely merely upon a summons. It is generally recognized that the burden is on the prosecutor to ensure that the defendant is available for trial and, if found guilty, for punishment. *Roberts*, 104 F.3d at 320 (citing *Lerwill*, 712 F.2d at 437-38) ("Without the presence of the accused, the initiation of a prosecution would be futile.") Washington follows this practice. Wash. Rev. Code 36.27.020(4), (6) (1996). *See, e.g., State v. Stewart*, 922 P.2d 1356 (Wash. 1996), *State v. Anderson*, 855 P.2d 671 (Wash. 1993); *State v. Greenwood*, 845 P.2d 971 (Wash. 1993); *see also* Brief of Amici Curiae Thirty-nine Washington State Counties in Support of Petition for Writ of Certiorari, at 2-3. Under this Court's functional analysis of immunity, the prosecutor's exposure should not turn on which procedure the prosecutor decides to use in order to bring the defendant before the court. As a practical matter, a mere summons would be ineffective in most felony prosecutions, to ensure the defendant's presence for trial, or allow the court to make other informed decisions.

munity would require that those decision-making functions be submitted to the crucible of the civil litigation process before the prosecutor's entitlement to immunity can be determined. The costs inherent in that process, in addition to the obvious chilling effect, include "the expense of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

Given the thousands of prosecutions annually for which modern-day prosecutors are responsible, requiring them to submit to the civil litigation process for making decisions to seek arrest warrants as part of initiating prosecutions, would impose "unique and intolerable burdens" not only on the individual prosecutor, but on society as well. *See Imbler*, 424 U.S. at 425-26. Moreover, this Court has observed in *Imbler* that "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers" and "[t]hese checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime." *Imbler*, 424 U.S. at 429.

Ms. Kalina's conduct in this case should be entitled to the protection of absolute immunity in accordance with long standing principles recognized by this Court in *Imbler* and its progeny.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court reverse the decision of the Court of Appeals for the Ninth Circuit and the decision of the district court below and remand this matter to the trial court for entry of a judgment of dismissal.

Respectfully submitted,

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April 25, 1997

APPENDIX

APPENDIX

WASHINGTON REVISED CODE 36.27.020

36.27.020. Duties

The prosecuting attorney shall:

(1) Be legal adviser of the board of county commissioners, giving them his or her written opinion when required by the board or the chairperson thereof touching any subject which the board may be called or required to act upon relating to the management of county affairs.

(2) Be legal adviser to all county and precinct officers and school directors in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;

(3) Appear for and represent the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party;

(4) Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county, and prosecute actions upon forfeited recognizances and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or the county;

(5) Attend and appear before and give advice to the grand jury when cases are presented to it for consideration and draw all indictments when required by the grand jury;

(6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed and the prosecuting attorney shall for that purpose attend when required by them if the prosecuting attorney is not then in attendance upon the superior court;

(7) Carefully tax all cost bills in criminal cases and take care that no useless witness fees are taxed as part of the costs and that the officers authorized to execute process tax no other or greater fees than the fees allowed by law;

(8) Receive all cost bills in criminal cases before district judges at the trial of which the prosecuting attorney was not present, before they are lodged with the board of county commissioners for payment, whereupon the prosecuting attorney may retax the same and the prosecuting attorney must do so if the board of county commissioners deems any bill exorbitant or improperly taxed;

(9) Present all violations of the election laws which may come to the prosecuting attorney's knowledge to the special consideration of the proper jury;

(10) Examine at least once in each year the public records and books of the auditor, assessor, treasurer, superintendent of schools, and sheriff of his or her county and report to the board of county commissioners every failure, refusal, omission, or neglect of such officers to keep such records and books as required by law;

(11) Examine once in each year the official bonds of all county and precinct officers and report to the board of county commissioners any defect in the bonds of any such officer;

(12) Make an annual report to the governor as of the 31st of December of each year setting forth the amount and nature of business transacted by the prosecuting attorney in that year with such other statements and suggestions as the prosecuting attorney may deem useful;

(13) Send to the state liquor control board at the end of each year a written report of all prosecutions brought under the state liquor laws in the county during the preceding year, showing in each case, the date of trial, name of accused, nature of charges, disposition of case, and the name of the judge presiding;

(14) Seek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law.

Enacted by Laws 1963, ch. 4, § 36.27.020, eff. Feb. 18, 1963. Amended by Laws 1975, 1st Ex.Sess., ch. 19, § 1, eff. May 6, 1975; Laws 1987, ch. 202, § 205.

WASHINGTON REVISED CODE 10.37.010

10.37.010. Pleadings required in criminal proceedings

No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state, and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.

Enacted by Laws 1925, Ex.Sess., ch. 150, § 3.

WASHINGTON REVISED CODE 9A.72.085

Matters in official proceeding required to be supported, etc., by sworn statement, etc., may be supported, etc., by unsworn written statement, etc.—Requirements of unsworn statement, form

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

(1) Recites that it is certified or declared by the person to be true under penalty of perjury;

(2) Is subscribed by the person;

(3) States the date and place of its execution; and

(4) States that it is so certified or declared under the laws of the state of Washington.

The certification or declaration may be in substantially the following form:

> "I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct":
>
> ....
>
> (Date and Place) (Signature)

This section does not apply to writings requiring an acknowledgement, depositions, oaths of office, or oaths required to be taken before a special official other than a notary public.

Enacted by Laws 1981, ch. 187, § 3.

WASHINGTON REVISED CODE 36.27.040

Appointment of deputies—Special and temporary deputies

The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal. Each appointment shall be in writing, signed by the prosecuting attorney, and filed in the county auditor's office. Each deputy thus appointed shall have the same qualifications required of the prosecuting attorney, except that such deputy need not be a resident of the county in which he serves. The prosecuting attorney may appoint one or more special deputy prosecuting attorneys upon a contract or fee basis whose authority shall be limited to the purposes stated in the writing signed by the prosecuting attorney and filed in the county auditor's office. Such special deputy prosecuting attorney shall be admitted to practice as an attorney before the courts of this state but need not be a resident of the county in which he serves and shall not be under the legal disabilities attendant upon prosecuting attorneys or their deputies except to avoid any conflict of interest with the purpose for which he has been engaged by the prosecuting attorney. The prosecuting attorney shall be responsible for the acts of his deputies and may revoke appointments at will.

Two or more prosecuting attorneys may agree that one or more deputies for any one of them may serve temporarily as deputy for any other of them on terms respecting compensation which are acceptable to said prosecuting attorneys. Any such deputy thus serving shall have the same power in all respects as if he were serving permanently.

The provisions of chapter 39.34 RCW shall not apply to such agreements.

Enacted by Laws 1963, ch. 4, § 36.27.040, eff. Feb. 18, 1963. Amended by Laws 1975, 1st Ex.Sess., ch. 19, § 2, eff. May 6, 1975.

1909 WASH. LAWS, CH. 87

PERMITTING ALL OFFENSES TO BE PROSECUTED BY INFORMATION

AN ACT to amend section 6802 of Ballinger's Annotated Codes and Statutes of Washington, relating to the prosecution of crimes by information.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That section 6802 of Ballinger's Annotated Codes and Statutes of Washington be and the same hereby is amended to read as follows: Sec. 6802. All public offenses may be prosecuted in the superior courts by information.

Passed by the Senate March 3, 1909.

Passed by the House March 10, 1909.

Approved March 11, 1909.

WASHINGTON CRIMINAL RULE 2.1

RULE 2.1 THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(b) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting attorney. Allegations made in one count may be incorporated by reference in another count. It may be alleged that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(c) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(d) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.

(e) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

(f) Defendant's Criminal History. Upon the filing of an indictment or information charging a felony, the pros-

ecuting attorney shall request a copy of the defendant's criminal history, as defined in RCW 9.94A.030, from the Washington State Patrol Identification and Criminal History Section.

[Amended effective July 1, 1984; September 1, 1986.]

WASHINGTON CRIMINAL RULE 2.2

RULE 2.2 WARRANT OF ARREST AND SUMMONS

(a) Warrant of Arrest. If an indictment is found or an information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant. Before ruling on a request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest must be supported by an affidavit or affidavits or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The court must determine that there is probable cause before issuing the warrant. The finding of probable cause may be based on evidence which is hearsay in whole or in part, subject to constitutional limitations.

(b) Issuance of Summons in Lieu of Warrant.

(1) *Generally*. If an indictment is found or an information is filed, the court may direct the clerk to issue a summons commanding the defendant to appear before the court at a specified time and place.

(2) *When Summons Must Issue*. If the indictment or information charges only the commission of a misdemeanor or a gross misdemeanor, the court shall direct the clerk to issue a summons instead of a warrant unless it finds reasonable cause to believe that the defendant will not appear in response to a summons, or that arrest is necessary to prevent bodily harm to the accused or another, in which case it may issue a warrant.

(3) *Summons*. A summons shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall state the name of the defendant and shall summon the

defendant to appear before the court at a stated time and place.

(4) *Failure to Appear on Summons.* If a person fails to appear in response to a summons, or if service is not effected within a reasonable time, a warrant for arrest may issue.

(c) Requisites of a Warrant. The warrant shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall specify the name of the defendant, or if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. The warrant shall specify the offense charged against the defendant and that the court has found that probable cause exists to believe the defendant has committed the offense charged and shall command that the defendant be arrested and brought forthwith before the court issuing the warrant. If the offense is bailable, the judge shall set forth in the order for the warrant, bail, or other conditions of release.

(d) Execution; Service.

(1) *Execution of Warrant.* The warrant shall be directed to all peace officers in the state and shall be executed only by a peace officer.

(2) *Service of Summons.* The summons may be served any place within the state. It shall be served by a peace officer who shall deliver a copy of the same to the defendant personally, or it may be served by mailing the same, postage prepaid, to the defendant at the defendant's address.

(e) Return. The officer executing a warrant shall make return to the court before whom the defendant is brought pursuant to these rules. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the issuing court to be canceled. The person to whom a summons has been delivered for service shall,

on or before the return date, file a return with the court before which the summons is returnable. For reasonable cause, the court may order that the warrant be returned to it.

(f) Defective Warrant or Summons.

(1) *Amendment.* No person arrested under a warrant or appearing in response to a summons shall be discharged from custody or dismissed because of any irregularity in the warrant or summons, but the warrant or summons may be amended so as to remedy any such irregularity.

(2) *Issuance of New Warrant or Summons.* If during the preliminary examination of any person arrested under a warrant or appearing in response to a summons, it appears that the warrant or summons does not properly name or describe the defendant or the offense with which the defendant is charged, or that although not guilty of the offense specified in the warrant or summons, there is reasonable ground to believe that the defendant is guilty of some other offense, the judge shall not discharge or dismiss the defendant but may allow a new indictment or information to be filed and shall thereupon issue a new warrant or summons.

[Amended effective September 1, 1983; September 1, 1986]

KING COUNTY, WASHINGTON LOCAL CRIMINAL RULE 2.2

WARRANT UPON INDICTMENT OR INFORMATION

(b) Issuance of Summons in Lieu of Warrant.

(1) *When Summons Must Issue.* Absent a showing of cause for issuance of a warrant, a summons shall issue for a person who has been released by a magistrate on the preliminary appearance calendar. The person shall be directed to appear on the arraignment calendar one week after the date of his/her release.

(g) Information to Be Supplied to the Court. When a charge is filed in Superior Court and a warrant is requested, the Court shall be provided with the following information about the person charged:

(1) The pretrial release interview form, completed by either a bail interviewer or by the defense counsel.

(2) By the prosecuting attorney, insofar as possible.

(A) A brief summary of the alleged facts of the charge;

(B) Information concerning other known pending or potential charges;

(C) A summary of any known criminal record;

(D) Any other facts deemed material to the issue of pretrial release.

(3) Any ruling of a magistrate at a preliminary appearance.

[Effective September 1, 1976]

WASHINGTON CRIMINAL RULE 3.4

PRESENCE OF THE DEFENDANT

(a) When Necessary. The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

(b) Effect of Voluntary Absence. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine only, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

(c) Defendant Not Present. If in any case the defendant is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served as a warrant of arrest in other cases.

[Effective July 1, 1967]